85-394

No. -

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

IN RE FRANCIS P. TRACEY,
PETITIONER.

PETITION FOR THE ISSUANCE OF A WRIT AUTHORIZED BY 28 U.S.C. § 1651(a)

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I.

Issues Presented For Review

I. Whether the Hon. A. DAVID MAZZONE, United States District Judge for the District of Massachusetts, abused his discretion and acted as a favor to the United States Attorney and erred in making rulings on controverted issues of fact in petitioner's §2255 filing on the basis of the Government's affidavits and response without a hearing, in affront to controlling case law laid down by this Court in *Machibroda*, and if so, a writ should issue to require the Hon. A. DAVID MAZZONE to rescind his order entered in the above and set the matter for a hearing.

II. Whether the United States Court of Appeals for the First Circuit perpetrated a fraud upon the Court, in particular Chief Judge CAMPBELL; Judge BOWNES, United States Circuit Judge; and Judge BREYER, United States Circuit Judge, and erred in affirming the decision of the Hon. A. DAVID MAZZONE, United States District Judge, without even reading the briefs as presented on appeal by your petitioner in petitioner's appeal No. 84-1100, in affront to controlling case law laid down by this Court in *Machibroda*, and if so, a writ should issue in the alternative, to require the United States Court of Appeals for the First Circuit, Chief Judge CAMPBELL, Judge BOWNES, United States District Judge, and Judge BREYER, United States District Judge, to recall the mandate issued in petitioner's appeal No. 84-1100 and remand the matter to the lower court for a proper hearing with instructions.

II.

List Of All Parties To The Proceeding In The Court Whose Judgment Is Sought To Be Reviewed

I. Hon. A. DAVID MAZZONE, United States District Judge.

II. Hon. Judge CAMPBELL, United States Court of Appeals for the First Circuit Chief Judge.

III. Hon. Judge BOWNES, United States Circuit Judge.

IV. Hon. Judge BREYER, United States Circuit Judge.

V. WILLIAM F. WELD, United States Attorney for the District of Massachusetts.

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IN RE FRANCIS P. TRACEY,
PETITIONER.

PETITION FOR THE ISSUANCE OF A WRIT AUTHORIZED BY 28 U.S.C. § 1651(a)

Petitioner, FRANCIS P. TRACEY, *pro se*, respectfully prays that a writ of mandamus issue to require the court below (Hon. A. DAVID MAZZONE, District Judge, or in the alternative, panel of Judges of the United States Court of Appeals for the First Circuit) to conduct an evidentiary hearing to resolve the controverted genuine issues of fact set forth in petitioner's §2255 filings.

This matter is presented to the Supreme Court of the United States directly, bypassing the lower court, and to Justice William Brennan, Jr., in particular, for the most extraordinary reason that the court below is the basis of the complaint that a fraud has been perpetrated upon the court in that petitioner's Constitutional right to due process was infringed upon in that the First Circuit Court of Appeals of the United States Court of Appeals did not even bother to read petitioner's briefs as presented on appeal of his §2255 filing and thence entered written opinions that were not directed to the issues presented

on appeal; an occurrence either deliberate or inadvertent upon the part of the court due to probably the crowded docket and increasingly overwhelming case load being heaped upon the Federal Court system, but of such magnitude that the ends of justice would best be served by a consideration of the Court of the instant petition.

Opinions Below

The Order of the lower court of November 7, 1983, denying petitioner's 28 U.S.C. §2255 motion without a hearing; petitioner's motion for reconsideration of the November 7, 1983 order denying his 28 U.S.C. §2255 motion without a hearing; and petitioner's two special motions for reconsideration of the lower court's denial of his §2255 motion without a hearing and the lower court's written opinions are attached hereto as Appendix A. (A-1).

The Order of the United States Court of Appeals for the First Circuit dated July 27, 1984 which affirms the order of the lower court was printed and published, and is attached hereto as Appendix B. (B-2) (No. 84-1100).

The Order of the United States Court of Appeals for the First Circuit entered on September 11, 1984, denying petitioner's Petition for Rehearing is attached hereto as Appendix C (C-3).

Jurisdiction

The jurisdiction of this Court is invoked under the All Writs Act, seeking a review of a United States Federal Judge's order and the issuance of a writ of mandamus pursuant to 28 U.S.C. §1651(a), which qualifications are conferred on this Court by the Constitution of the United States and by the Congress of the United States, and by existing prior case law.

Constitutional Provisions

The following provisions of the United States Constitution are involved:

Article I, Section 9, ¶2, of the Constitution of the United States. The text of said Article is attached hereto as Appendix G. (G-1).

United States Constitutional Amendment V. The text of said provision is attached hereto as Appendix D. (D-1).

United States Constitutional Amendment VI. The text of said provision is attached hereto as Appendix E. (E-1).

United States Constitutional Amendment XIV. The text of said provision is attached hereto as Appendix F. (F-1).

Proceedings Below

Petitioner Francis P. Tracey was indicted on January 18, 1981 on three counts of income tax evasion and three counts of filing false income tax returns as a result of an investigation of the Administration of former Mayor Kevin H. White of Boston by former United States Attorney Edward F. Harrington in relation to campaign contributions made to Mayor Kevin White, an investigation which the prestigious *National Law Journal* labeled as a 'vendetta' upon the part of former United States Attorney Edward F. Harrington and William F. Weld, United States Attorney.

Petitioner Francis P. Tracey was convicted by a jury trial on May 1, 1981. Petitioner Francis P. Tracey did not take the stand in his own defense. Hon. Judge A. DAVID MAZZONE, District Judge, sentenced petitioner on May 18, 1981 to eighteen months incarceration and imposed a $15,000.00 fine. Petitioner Francis P. Tracey has completed his prison sentence and has paid the fine in full.

Petitioner Francis P. Tracey appealed his conviction to the United States Court of Appeals for the First Circuit (*United States* v. *Tracey*, 675 F.2d 433 1st Cir. 1962). The First Circuit affirmed in an opinion authored by Judge BOWNES, Circuit Judge, on April 15, 1982.

Petitioner Francis P. Tracey, filed a motion under 28 U.S.C. §2255 on September 29, 1983. The motion under 28 U.S.C. §2255 was denied by Hon. A. DAVID MAZZONE, District Judge, on November 7, 1983, without a hearing. Petitioner filed three motions for reconsideration which were denied without hearing by Hon. A. DAVID MAZZONE, District Judge.

Petitioner Francis P. Tracey appealed the Hon. A. DAVID MAZZONE's order denying his motion and the United States Court of Appeals for the First Circuit on July 27, 1984 in an opinion authored by Judge BOWNES, Circuit Judge, affirmed the lower court's ruling without even having read petitioner's briefs on Appeal (No. 84-1100), as the written opinion handed down by the First Circuit had nothing to do with petitioner's points raised on Appeal (No. 84-1100) as presented in his printed briefs.

Petitioner at all times has been proceeding *Pro Se*.

Petitioner's petition for rehearing was denied by the First Circuit on September 11, 1984, without comment. This Court denied certiorari.

Statement Of The Case

This is not a case of a straight and forward income tax evasion matter wherein the collateral investigation went on to criminal prosecution for blatant disregard for our present day tax institution in the United States. *U.S.* v. *Tracey*, is the result of a personal 'vendetta' of former United States Attorney Edward F. Harrington against the former Mayor Kevin White Administration in Boston; wherein Mr. Edward F. Harrington sought to utilize the popularity nationwide of former Mayor Kevin White of Boston as an entree onto the National Political scene and further higher political office for Edward F. Harrington. The entire scenario must be understood in the proper perspective to realize why the Government's allegations, even granted a jury conviction, do not pass muster. The term 'ven-

detta' is a direct quote from the *National Law Journal's* series of articles on the Mayor Kevin White investigation in Boston which has been fully covered by the media.

Petitioner Francis Tracey was a deputy commissioner of the City of Boston Real Property Department during the former Mayor Kevin White Administration. Your Petitioner was a long time administrative servant throughout several Mayoral Administrations in Boston, a career politician, and to the Government's delight, a person highly placed in the Kevin White Administration.

Petitioner Francis Tracey was of the old Boston Democratic political scene, fiercely loyal to his Mayor, who at all costs thought of the integrity and political well being of the 'boss' first, Mayor Kevin White, and his own well being second. Such individuals can be found in any large City Mayoral Administration wherein a Democratic or Republican Administration of long standing prevails. But in Boston, the tradition dates back to the arrival of the Mayflower in this Country; in fact, this philosophy of Government is what built our Country and made us as strong as we are and far superior to any other form of Government in the world today. In reality, this is the form of Government that welded the framework of Washington politics and Washington Government itself, and indeed, provided the basis for the present day Supreme Court of the United States. Could one be naive enough to believe that an appointment to the Supreme Court bench flows solely from a Jurist being a great Constitutional authority teaching at one of our Country's prestigious Law Schools?

The drama thence unfolds. Former United States Attorney Edward F. Harrington, seeking national political office, sought to target each and every member of the Kevin White Administration through the power of State (with Federal funding wherein Mr. Harrington controlled the funds and indirectly who the Grand Jury would investigate) and Federal Grand Juries. Bobby Kennedy, while Attorney General of the

United States, used to delight in asking visitors to his office in Washington, D.C., to step over to his broad and expansive windows that overlooked the busy street below; and to show the tremendous power of the United States Attorneys' Office, would say to his awestricken visitor, "Look at all the people down there on the sidewalk and pick out anyone you like, and I can get that person indicted and convicted on something by one of my Federal Grand Juries," and with a dry smile would add, "and that person could be as innocent as a newborn child."

Former United States Attorney Edward F. Harrington, having utilized the auspices of the Federal Bureau of Investigation in Boston and his own United States Attorneys' investigators, at great expense to the American taxpayer, and also at a great loss to the investigation and prosecution of real crime in the Boston area, came up with a 'hat-full of rain' in that he was unable to formulate any investigation that could produce an indictment against former Mayor Kevin White or any other member of his Administration that could 'taint' the character of former Mayor Kevin White, who remains today, now a University professor, though an old-time political warrior, a stalwart of integrity unbesmirched by the 'slings and arrows' of political turmoil and upheaval.

Thence enters on the scene, Francis X. Green, a person of dark and ominous character, longtime friend and political fund raiser for Mr. Harrington, and to wit; a political opportunist who had a symbiotic relationship with Mr. Harrington. Politics "makes strange bedfellows," as the old adage goes on to state, as we all know.

Former United States Attorney Edward F. Harrington sought out his old-time friend, Francis X. Green, who at the time was unemployed and impecunious, and funded him with a $30,000.00 loan arranged by the Government at the Capitol Bank of Boston.

Mr. Green set up a 'shell' corporation to arrange bids on various City of Boston leased garage facilities throughout Boston, as an entree by Mr. Green to City Hall in Boston.

Former United States Attorney Edward F. Harrington had Mr. Green wired with recording devices on his visits to City Hall, except for the first meeting at the Real Property Department, in former United States Attorney Edward F. Harrington's attempt to obtain incriminating evidence of political corruption in the Kevin White Administration. Neither the actual tape recordings nor transcripts of the recordings were turned over to your petitioner at the time of the trial of *U.S. v. Tracey*, nor were the tape recordings utilized by the Government at the time of petitioner's trial below.

Mr. Francis X. Green alleged at petitioner's trial below that he had given campaign contributions for the Mayor Kevin H. White re-election fund to your petitioner at various times during the periods that Mr. Green operated garages for the City of Boston between late 1974 and the first part of 1976, amounts allegedly approximately in the sum of $10,000.00; $4,000.00 in several $500.00 installments; $6,000.00 and a single payment of $3,000.00 for Christmas gifts. The Government presented a tax evasion case against your petitioner on the basis of the two-prong method of proof, which hypothesis sets out to show on one hand a certain dollar figure spent in a given period of time, and then also a likely source of the alleged unreported income. Mr. Green was the basis for the alleged unreported source of income in your petitioner's case below.

The record reflects that the Government's tax division, under the direction of Walter Miles, undertook an exhaustive search of a likely source of unreported income for your petitioner for the years under investigation, and even though their travels and investigations ranged from Florida to Paris, not to mention every person who did business with the Real Property Department of the City of Boston during the periods that your Petitioner was associated with said department, which investi-

gation turned up no source of unreported cash attributable to your Petitioner in the form of 'cash kick-backs' or 'campaign contributions' or any other source.

Strange as it may seem, the only source of cash presented at Petitioner's trial below was the alleged statements made by one Francis X. Green, a personal friend of former United States Attorney Edward F. Harrington, the 'one and only' and 'key and crucial prosecution witness' whose testimony was completely uncorroborated.

Mr. Harrington has stated that Mr. Francis X. Green just 'walked into his office as a public spirited citizen' who wished to 'offer his help in a political matter,' which thence led to his becoming the 'key and crucial witness' in petitioner's trial below.

Former United States Attorney Edward F. Harrington has subsequently made the statement on national television during a talk show that 'he (Edward F. Harrington) has never used the testimony of only one witness against anyone in a Federal trial whose testimony was uncorroborated.'

This statement was made in regards to an unrelated matter involving Mr. Harrington's running battle with Mr. Francis X. Bellotti, the Attorney General of Massachusetts, and one of Mr. Harrington's nemeses.

As George Herbert, the philosopher said, "One enemy is too much."

Reasons Why The Writ Should Be Granted

This Court in *Machibroda* v. *United States*, 368 U.S. 487, 7 L.Ed.2d 473, 82 S. Ct. 510, decided that in 28 U.S.C. §2255 filings, controverted issues of fact may not be decided on the basis of affidavits alone, but that the District Court must afford the petitioner a hearing so that he has an opportunity to prove his allegations.

In *Machibroda*, this Court stated:

> "But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U.S.C. §2255 can be served in this case only by affording the hearing which its provisions require. Vacated and remanded."

As of the date of this application, *Machibroda* v. *United States* has not been reversed by this Court.

Petitioner Francis P. Tracey's filing is under 28 U.S.C. §2255. The allegations made in Petitioner's filings, motions and affidavits placed before the court in his §2255 proceedings, if accepted as being true, would certainly, without a doubt, entitle Petitioner to be granted relief.

The allegations presented by Petitioner in his §2255 filings, when taken in light of the Government's response, leave controverted issues of fact to be decided.

The lower court, to wit, the Hon. A. DAVID MAZZONE, District Judge, made findings on controverted issues of fact in Petitioner's §2255 filings without a hearing.

Petitioner Francis P. Tracey respectfully requests that a writ of mandamus issue against the Hon. A. DAVID MAZZONE, District Judge, to conduct or in the alternative, order a magistrate to conduct a hearing in Petitioner's §2255 filings and allow Petitioner an opportunity to produce his witnesses and evidence to prove his allegations, and thereafter the court can make findings on the facts presented at said hearing in the court below.

The United States Court of Appeals for the First Circuit, in an opinion authored by Judge Bownes, Circuit Judge, concurred in by Judge Campbell, Chief Judge, and Judge Breyer, Circuit Judge, did affirm the Order of the lower court, entered by Hon. A. DAVID MAZZONE, District Judge, denying Peti-

tioner's motion under 28 U.S.C. §2255 without a hearing, thereby making findings on controverted genuine issues of fact without 'notice to the prisoner and without a hearing.'

As of the date of this application, as previously set forth, *Machibroda* v. *United States,* has not been reversed by this Court.

Petitioner Francis P. Tracey's filing is under 28 U.S.C. §2255. The allegations made in Petitioner's filings, motions and affidavits placed before the court below in his §2255 proceedings, if accepted as true, would entitle Petitioner to be granted relief. The allegations presented by Petitioner in his §2255 filings, when taken in light of the Government's response, leave controverted issues of fact to be decided. In effect, the First Circuit of the United States Court of Appeals concurred with the lower court in making findings on controverted issues of fact in a §2255 proceeding without affording the 'prisoner a hearing.'

This Court in *Machibroda* stated:

> "But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U.S.C. §2255 can be served in this case only by affording the hearing which its provisions require. Vacated and remanded."

The point, at the present time, is one, to look to the Supreme Court of the United States for direction on how one is to interpret the law of the United States, or after two hundred years, has this authority been so delegated to the Hon. A. DAVID MAZZONE, District Judge, of Boston, Massachusetts, and/or the United States Court of Appeals for the First District, in particular, the panel of Judges; Campbell, Chief Judge; Bownes, Circuit Judge; and Breyer, Circuit Judge.

Everyone is fully aware that Chief Justice Warren Burger wants to split up the Supreme Court of the United States and delegate some of its duties and powers to intermediary courts, so as to gain some relief from the awesome workload foisted upon the Court, but as of this date, Congress has not acquiesced to Chief Justice Warren Burger's requests and done so.

Thomas Jefferson and our founding Fathers have entrusted the formulation of controlling case law in these United States, ever so wisely, in the Justices of the Supreme Court of the United States. Woe be it to the little, insignificant man or woman in the United States if this were to change. Such a thought would go beyond the pale. And rightly so, this Court, in its 200 years of Wisdom, should come down like 'Harry hard-bar' on any Federal Jurist who would 'whimsically' rule in opposition to such controlling case law.

Petitioner Francis P. Tracey respectfully requests that a writ of mandamus issue against Judge Campbell, Chief Judge; Judge Bownes, Circuit Judge; and Judge Breyer, Circuit Judge, and the United States Court of Appeals for the First Circuit, to recall the mandate issued in *Tracey* v. *United States*, 84-1100, and reconsider their opinion in light of *Machibroda*.

The real question presented is, succinctly put, why has the Government so sternly resisted all efforts of the court below to allow a hearing in your Petitioner's proceedings, even in face of the intent of Congress to provide a 'speedy hearing in § 2255 proceedings?'

The United States Attorney for the District of Massachusetts has embarked upon a 'vendetta' against former Mayor of Boston, Kevin H. White and his former administration, as outlined in the media over the past years and highlighted by articles in the prestigious *National Law Journal*.

Justice Clark, in writing his dissent in this Court's opinion in *Machibroda* stated:

> "The opinion is an invitation to prisoners, always seeking a sojurn from their keepers, to swear to 'Munchausen' tales when self-interest readily leads to self-deception in §2255 applications. Once the opinion goes the rounds of our prisons, we will likely be plagued with a rash of such spurious applications."

Justice Clark has a point, although placed in the most cynical light, but one is reminded of a more prudent and perhaps learned Jurist who has often stated: "That it is better to allow 100 guilty persons go free than to restrain the liberty of one innocent man."

Congress in their wisdom has so framed the Rules governing §2255 filings to allow for a speedy hearing in §2255 filings, and indeed, this Court in its wisdom has stated in its opinion in *Machibroda:*

> "Accordingly, we think the function of 28 U.S.C. §2255 can be served in this case only by affording the hearing which its provisions require. Vacated and remanded." *Machibroda* v. *United States*, 368 U.S. 487 at 479, 7 L.Ed.2d 473, 82 S. Ct. 510.

Congress is still the body in the United States which is slated to formulate and write the laws of the United States by which we must all abide. The Federal Courts are only supposed to carry out the mandates laid down by Congress, as set fort by our founding fathers. This Court is the ultimate forum by which our laws may still be interpreted, and to this day the controlling case law laid down by *Machibroda* has not been changed by this Court.

In the instant case, your Petitioner had fully served his prison sentence at the moment his petition was placed before the Hon. A. DAVID MAZZONE, District Judge, in the court

below. There never was a question as to your Petitioner seeking 'a sojourn from his keepers' as so aptly put in the dissent of Justice Clark in *Machibroda*, and thus there again was no need for your Petitioner to embark upon or 'to swear to "Munchausen" tales when self-interest readily leads to self-deception in §2255 applications,' as your Petitioner was living in Boston at the time. Objection has been raised by various Federal Jurists and Courts of Appeal that hearings in habeas matters are a tremendous expense to the Government, in that "the prisoner must be transported at great expense to the court" for the hearing. This frequently has been utilized as a reason why not to grant a hearing in these matters. In *Tracey* v. *United States*, your Petitioner was at all times available for an appearance in the Boston area without any cost to the Government.

The dissent set forth in this Court's opinion in *Machibroda*, as authored by Justice Clark, is based entirely upon the fact that to allow a hearing in a §2255 matter would involve great expense and danger to the court. The Court stated:

> "Alcatraz is a maximum security institution housing dangerous incorrigibles, and petitioner wants a change of scenery. The Court has left the door ajar for a trip from California to Ohio along with the accompanying hazards. I would deny it," quoting from Justice Clark.

See *Machibroda* v. *United States*, 368 U.S. 487 at 482, 7 L.Ed.2d 473, 82 S. Ct. 510. Nothing in the dissent set forth in *Machibroda* would apply to your Petitioner's instant case.

Then let us examine the real reason why the Hon. A. DAVID MAZZONE, District Judge, refused your Petitioner a hearing in his §2255 filing, and which reason forms the basis for the immediate application. The United States Attorney for the District of Massachusetts, so engaged in a personal 'vendetta' against former Mayor Kevin H. White of Boston and Mayor White's Administration, as outlined by the *National*

Law Journal and previously mentioned in this petition, so influenced Judge MAZZONE that the court below was afraid to afford your Petitioner a hearing in his §2255 proceedings as was intended by the Congress of these United States. And in particular, the court below was deathly afraid of what revelations might come forth in open court as to the deception in the prosecution of the cases that have swirled about the former Mayor Kevin H. White's Administration members who were indicted by the United States Attorney's Office in their attempt to 'tar by the same brush' the former Mayor of Boston, Kevin H. White. To this day, the Office of the United States Attorney for the District of Massachusetts, with all the power of the United States Government and resources of the Federal Bureau of Investigation and the United States Attorney's own army of investigators, has not been able to produce an indictment against the former Mayor of Boston, Kevin H. White, being ever so mindful of the comment of former United States Attorney Bobby Kennedy, "that I can get anyone I want indicted by a Federal Grand Jury, whether they are guilty or innocent, makes no difference."

The aforementioned allegations of basic unfairness in regard to the application of the Federal Justice System by the United States Attorney's Office for the District of Massachusetts in the case of *U.S.* v. *Tracey*, are not just those expressed by your petitioner, but also those of others, not the least of which is the United States Court of Appeals for the First Circuit themselves, in *United States* v. *Anzalone*. Quoting from the July 2, 1985 issue of the *New York Times:*

> "BOSTON, July 2(AP) - A Federal Appeals Court on Monday overturned the misdemeanor conviction of former Mayor Kevin H. White's chief fund raiser, Theodore V. Anzalone.
>
> The ruling by the United States Court of Appeals for the First Circuit cleared Mr. Anzalone of the last charges brought against him in a Federal investigation of Mr. White's administration.

> The court admonished the office of William Weld, the United States Attorney here, saying,
>
> > 'We cannot engage in unprincipled interpretations of the law lest we permit lawlessness instead of compliance.' "

A writ authorized by 28 U.S.C. §1651(a), as authorized under the All Writs Act, is considered an extraordinary writ, and the issuance of said writ is to be taken as a serious matter and undertaken only for the most serious reasons.

The influence of the United States Attorney's Office for the District of Massachusetts, headed by Mr. William F. Weld, upon the lower court in directing the lower court's decisions in your Petitioner's §2255 proceedings has thwarted Congress' intentions in 28 U.S.C. §2255 proceedings.

The Office of the United States Attorney for the District of Massachusetts, or any such office in the United States, should be above reproach, but as Harvard Law Professor Alan Dershowitz has indicated in his book *BEST DEFENSE*, this is not always the case.

The founding fathers of this country, in their wisdom, have so formulated the judicial system on the Federal level that Federal Judges are appointed for life and were so installed to office that they should remain independent and autonomous in their own court room, but current history has shown that the Government, primarily in the form of the local United States Attorneys' Office, plays a role of controlling influence on the everyday activities of the Federal Judges under their auspices, as seen recently in Cleveland, Nevada and Denver, where a Federal Judge may all of a sudden forfeit his 'authorized parking space' or have his air conditioning 'turned off' in his courtroom, or appear one day and 'find his chamber doors locked' or some other 'mysterious' happening or his docket upset by a change in vacation schedule. This Court is very familiar with the various allegations published in the *National Law Journal* over the past several months. Only the uninitiated

would be so naive as not to comprehend the politics involved in the Federal Judicial System.

Severe measures demand unusual and extraordinary means of correction. Your Petitioner has sought the use of issuance of a writ authorized by 28 U.S.C. §1651(a) as a means of last resort, to correct a grave miscarriage of justice and so that the ends of justice may be met. Your Petitioner has undertaken these proceedings under the most solemn and awesome conditions. Controlling case law as set down by this Court embraces all citizens of the United States, which includes the Government and Federal Judges.

When a *pro se* petitioner in a 28 U.S.C. §2255 proceedings makes allegations that, if proven true, would entitle him to relief, he should not be required to prove his allegations in advance of an evidentiary hearing, at least in the absence of counter-affidavits conclusively proving their falsity. See *Blackledge* v. *Allison*, 431 U.S. 63, 52 L.Ed.2d at 145, 97 S. Ct. 1621.

The Court in *Blackledge* further stated:

> "Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees."

See *Harris* v. *Nelson*, 394 U.S. 286, 290-291, 22 L.Ed.2d 281, 89 S. Ct. 1082. Further in *Blackledge*, this Court stated:

> "that if true the allegations in his petition entitled him to relief; and that he deserved a chance to establish their truth." *Blackledge* v. *Allison*, 431 U.S. 63, 52 L.Ed.2d 145, 97 S. Ct. 1621.

In *Blackledge*, this Court stated:

> "that the court may not, however, resolve critical factual questions against the petitioner simply on the basis of *ex parte* government affidavits. Affidavits may assist only in determining if there is a genuine issue of fact to resolve."

In the instant case, Petitioner is entitled to have an opportunity to prove his allegations.

Petitioner Francis Tracey's motion and affidavits in his §2255 proceedings contain charges which are specific and detailed and said factual allegations as put in issue by an affidavit filed with the Government's response remain controverted issues of fact.

Petitioner alleged that the prosecutor in his trial below, former United States Attorney Edward F. Harrington, did willfully and knowingly induce his friend, one Francis X. Green, to give perjured testimony at Petitioner's trial below in that Francis X. Green made false allegations of having made 'cash payoffs' to Petitioner in the form of cash campaign contributions to Mayor Kevin H. White (Mayor Kevin H. White being the former Mayor of Boston, your Petitioner having been in Mayor White's Administration), and that the false testimony of Mr. Green was the 'lynchpin' (a word used by the United States Court of Appeals for the First Circuit, see *U.S.* v. *Tracey*, 675 F.2d 438) testimony in the Government's case against Petitioner in the court below; further, Petitioner's private investigators have uncovered this information and that Petitioner is prepared to produce witnesses in proof thereof.

The former United States Attorney Edward F. Harrington introduced an affidavit that Mr. Harrington did not know Francis X. Green, which affidavit was introduced in Petitioner's trial proceedings in the court below, when in fact, Mr. Harrington was a personal friend of Mr. Francis X. Green, and that said affidavit was false and Mr. Harrington did knowingly execute the false affidavit to obfusticate the court proceedings below, your Petitioner has presented to the court affidavits of witnesses who will testify as to the falsity of former United States Attorney Edward F. Harrington's affidavit.

The testimony of Mr. Francis X. Green, who was the Government's 'one and only key and crucial prosecution witness' in Petitioner's trial below, which testimony was uncorroborated,

has been proven false by Petitioner's investigators, which testimony was vital to the Government's case as quoting from the United States Court of Appeals for the First Circuit's opinion in *U.S.* v. *Tracey:*

> "We note our belief that the witness (Mr. Francis X. Green) was an important factor in appellant's conviction. The Government contends, given its two-pronged method of proving appellant's unreported taxable income and relevance of Mr. Green's testimony to only one-prong, that Mr. Green was not a crucial witness. We do not agree."

See U.S. v. *Tracey*, 675 F.2d at 438.

Further, former United States Attorney Edward F. Harrington, granted 'pocket-immunity' to Mr. Francis X. Green at Petitioner's trial below, and that the grant of immunity was withheld from being revealed to Petitioner's trial jury in the proceedings in the court below. On the witness stand in the trial below, Mr. Harrington further induced Mr. Green to perjure himself in that Mr. Green in several responses to direct and cross examination stated that he was not granted immunity, and the point being, that had Petitioner's jury in his trial below, known that the Government had granted Mr. Green immunity, the jury might have reached a different verdict. In fact, the Government during Petitioner's trial below, did actually on several occasions tell the jury that Mr. Green was not granted immunity in exchange for his testimony, a fact that did so infect Petitioner's entire trial process.

Thusly, the dastardly acts of the former United States Attorney Edward F. Harrington deliberately frustrated the judicial process and denied Petitioner of a fair trial, all of which was taken as 'a form of higher justice' in Mr. Harrington's overzeal to gain a conviction of one of former Mayor Kevin H. White's 'inner-sanctum' members, your Petitioner, Francis Tracey. Your Petitioner's right to a fair trial, as guaranteed by the Constitution of the United States, was thusly thwarted.

The Government's 'one and only key and crucial witness' Francis X. Green, in all his visits to see Petitioner Francis Tracey at City Hall, other than the first visit, was wired with a recording device, the tapes produced by said recording device were never introduced into evidence at Petitioner's trial below, and the recordings were suppressed by the former United States Attorney Edward F. Harrington. The fact that Mr. Green was wired during his conversations with Petitioner Francis Tracey and other members of Mayor White's Administration was kept from Petitioner's jury at his trial below and further none of the recorded tape conversations were turned over to the defense at Petitioner's trial even though a motion for all such material was filed with the court below.

Petitioner Francis Tracey has introduced in his §2255 motion proceedings with the court below, the affidavits of witnesses who are now willing to come forward at the time of a hearing to testify to the fact that Mr. Francis X. Green did telephone Mr. Harrington on Mr. Harrington's private number at his home during the dead of night to request Mr. Harrington to come to the Dedham Jail in Massachusetts and bond Mr. Green out of jail. At the time, Mr. Green knew Mr. Harrington's private home telephone number and Mr. Harrington was such a close friend of Mr. Green's that Mr. Harrington left his home in the dead of night to arrange for his friend's release without giving it a second thought. At the time, Petitioner's affiants will attest to the fact that Mr. Green stated on more than one occasion that he was a personal friend of former United States Attorney Edward F. Harrington. Yet, Mr. Harrington has filed with the court below, an affidavit that he did not know Mr. Green.

The Dedham Jail incident involving the former United States Attorney Mr. Edward F. Harrington, arranging for bail for his friend Mr. Green, took place sometime after midnight, on the 13th day of October, 1979. The former United States Attorney Mr. Edward F. Harrington, executed an affidavit for

the court below, wherein he stated he did know Mr. Green, said affidavit being dated the 31st day of December, 1981.

Further the Hon. A. DAVID MAZZONE, District Judge, in a 'Memorandum and Order on Defendant's Motion for a New Trial' dated 'January 19, 1984,' did further thwart Petitioner's 'fair trial process' and 'deliberately mislead the court' as a favor to the former United States Attorney Edward Harrington in his bid to prevent a fair hearing being held, stating, and I quote:

> "Finally, and most importantly, by October 12, 1979, when this incident occurred at the Dedham Jail, Green had already testified before the grand jury. That grand jury testimony was available to defendant at trial. Green's trial testimony essentially followed his grand jury testimony and there was no showing that his testimony was changed or embellished in any way as a result of Harrington's intervention. His testimony was consistent before and after the incident and would not have affected the jury's assessment of Green's credibility or bias.... Accordingly, the defendant is not entitled to a new trial. The motion is denied."

Judge MAZZONE would have the court believe that Mr. Green had already testified before the grand jury and that your Petitioner was already indicted by that grand jury on Mr. Green's testimony.

The fact of the matter is that Mr. Green was scheduled to appear, and he did appear, at a different grand jury at 10:00 A.M. in the morning of October 16, 1979, three days after the Dedham Jail incident which Judge MAZZONE treated as insignificant, and it was this second grand jury which eventually indicted your Petitioner, Francis Tracey.

This fact was not known to your Petitioner at the time of his trial below and was kept from his jury at the time of his trial below in 1981. This glaring fact was known by, or should have been known by, the Hon. A. DAVID MAZZONE, District Judge, prior to his making the ruling above stated.

The shielding by the Hon. A. DAVID MAZZONE, District Judge, of former United States Attorney Edward Harrington, was an abuse of discretion as to the interests of justice, and inconsistent with notions of fair play and a fair trial process.

> See *Cinderella Career & Finishing Schools* v. *FTC*, 425 F.2d 582 (1970); *Whitacker* v. *McLean*, 118 F.2d 596, (1941); *Bursten* v. *United States*, 395 F.2d 976 (5th Cir.); *United States* v. *Bukowski*, 435 F.2d 1094; *United States* v. *Tyminski*, 418 F.2d 1060 (2d Cir. 1969); see also *Disqualification of Judges for Bias in the Federal Courts*, 79 HARVARD LAW REVUE, 1435 (1966).

No judge should remain aloof while the prosecution ignores important evidence, or indeed, while the defense fails to explore testimony central to the issues at trial or fails to raise defenses which may exonerate the accused.

> See *Carrado* v. *United States*, 210 F.2d 712 (1953); *Atkins* v. *United States*, 347 U.S. 1018, 74 S. Ct. 874, 98 L.Ed. 1140 (1974); *Patterson* v. *United States*, 413 F.2d 1001 (5th Cir. 1969); *United States* v. *Ramos*, 413 F.2d 743 (1 Cir. 1969); *United States* v. *Spica*, 413 F.2d 129 (8th Cir. 1969); *United States* v. *Ragsdale*, 438 F.2d 21 (5th Cir.); *United States* v. *Leonard & Sarvis*, 494 F.2d 955 (1974).

The judge, like the prosecutor in this respect, is not a passive by-stander in the arena of justice, a spectator at a 'sporting event;' rather he or she has the most pressing affirmative responsibility to see that Justice is done in every case. See, A. Goldstein, *Reflections on Two Models; Inquisitorial Themes in American Criminal Procedure*, 26 STANFORD LAW REVUE, 1009 (1974).

When the trial judge intervenes in the conduct of the trial, this Court must determine whether the intervention is in pursuit of justice and whether that intervention is consistent with the premises of the limits on intervention.

> See *Young* v. *United States*, 346 F.2d 793 (1965); *United States* v. *Cruz*, 455 F.2d 184 (2d Cir.); *United States* v. *Henson*, 486 F.2d 1292 (1973); *Bursten* v. *United States*, 395 F.2d 976 (5th Cir. 1968); *United States* v. *Porter*, 441 F.2d 1204 (8th Cir.); *Harrison* v. *United States*, 404 U.S. 911, 92 S. Ct. 238.

The issues raised by your Petitioner have foundation in the basic fabric of fairness and justice of the judicial system and should be dealt with as to the merit of the claims irregardless as to whether or not prejudice to Petitioner can be shown, and for this Court to 'blink' at Petitioner's claims would seriously impair the judicial process.

> See *Kaufman* v. *United States*, 394 U.S. 217, 83 S. Ct. 822, 9 L.Ed.2d 837 (1969); *United States* v. *Tortorella*, 480 F.2d 764 (2d Cir. 1973); *United States* v. *Baxter*, 492 F.2d 150 (9th Cir. 1973).

The duty of the United States Attorney is to execute his office according to the highest ethical precepts and to avoid even the appearance of besmirching the trial process. See *United States* v. *Beckett*, 706 F.2d 519; *Riviera* v. *United States*, 318 F.2d 606 (CA 9 1963).

Generally prosecutorial misconduct is reducible to certain specific errors which arguably may have prejudiced the defendant. Thus, courts have ordered new trials when the prosecution has knowingly used perjured testimony, as in the instant case. See *Levin* v. *Clark*, 133 U.S. App. D.C. 6, 8, 408 F.2d 1209 (1967).

Judge Bazelon stated in *Levin:*

> "The rationale of these cases seems to have been that convictions must not be obtained through prosecutorial misconduct which violates civilized notions of fairness and thereby taints the entire criminal process. Lawless law enforcement should not be tolerated."
> *Levin* v. *Clark*, 408 F.2d 1209 (1967).

See also *Mesarosh* v. *United States*, 352 U.S. 1; *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Levin* v. *Katzenbach*, 363 F.2d 287; *Coggins* v. *O'Brien*, 188 F.2d 130 (1st Cir. 1951); *United States* v. *Pearson*, 448 F.2d 1207 (5th Cir.); Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEXAS LAW REVUE, 629 (1972).

Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the writs of mandamus as authorized by 28 U.S.C. §1651(a) should be so granted.

Respectfully submitted,

FRANCIS P. TRACEY, *Pro Se*
36 Belmont Road
West Harwich, MA 02671
(617) 394-4385
Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 83-2930-MA

FRANCIS P. TRACEY

v.

UNITED STATES OF AMERICA

ORDER OF DISMISSAL

MAZZONE, D.J.

In accordance with the Court's memorandum and order entered on November 7, 1983 on the motion under 28 U.S.C. §2255 to vacate, set aside, or correct sentence by a person in federal custody, it is hereby ORDERED that the above entitled action be and hereby is dismissed.

By the Court,

(s) HELEN M. COSTELLO
Deputy Clerk

November 8, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 83-2930-MA

FRANCIS P. TRACEY,
PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT

MEMORANDUM AND ORDER

MAZZONE, D.J. November 7, 1983

This matter is before the Court on the plaintiff's motion under 28 U.S.C. §2255 to vacate, set aside, or correct sentence by a person in federal custody. The motion presents six grounds.

(1) *Failure To Disclose Exculpatory Evidence*

The record at trial shows the defendant had the evidence he claims was not disclosed, namely, the relationship between the key witness and the United States Attorney. He was allowed extensive examination on the relationship. There was no actual prejudice even if the information was not disclosed. *Frady* v. *United States*, 456 U.S. 152, 167-168 (1982).

(2) *Selective Prosecution*

This defense should be raised prior to trial. Fed.R.Cr.P. 12(f). In any event, the prosecutorial decision is presumed to have been made in good faith. The plaintiff has not overcome this presumption. *United States* v. *Saade*, 652 F.2d 1126 (1st Cir. 1981).

(3) *Failure To Disclose Further Evidence*

This ground relates to the failure of the government to disclose the fact that the key witness had worked for the

United States Attorney during a political campaign in 1974. This matter was fully addressed on appeal and need not be considered anew. *United States* v. *Tracey*, 675 F.2d 433, 441-442 (1st Cir. 1982).

(4) *Restriction of Cross-Examination*

This ground was also addressed during trial and on appeal and requires no further discussion here. *United States* v. *Tracey*, at 437-439.

(5) *Improper Considerations in Sentencing*

The record does not show any improper considerations. The plaintiff had ample opportunity to speak, both for himself and through counsel. The pre-sentence report was reviewed and the plaintiff given the opportunity to correct any errors or omissions. The plaintiff has not shown that the sentence was based on improper considerations. *Brown* v. *United States*, 610 F.2d 672, 675 (9th Cir. 1980).

(6) *Perjured Testimony of Witness*

The plaintiff claims the key witness offered perjured testimony when he testified that he made payments to the plaintiff during a time when he was confined to the hospital or in Florida. This was presented at trial and its consideration was for the jury.

Conclusion

The plaintiff has failed to show, by a preponderance of the evidence, that he is entitled to an evidentiary hearing. *United States* v. *DiCarlo*, 575 F.2d 959 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978). On the record, it plainly appears that the movant is not entitled to relief and the motion is dismissed. Rule 4(b), Rules Governing Section 2255 Proceedings.

So Ordered.

(s) A. David Mazzone
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 83-2930-MA

FRANCIS P. TRACEY,
PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT

MOTION

FOR RECONSIDERATION OF ORDER OF DISMISSAL OF MOTION PURSUANT TO 28 U.S.C. SECTION 2255 TO VACATE, SET ASIDE OR CORRECT SENTENCE

Now comes FRANCIS P. TRACEY, *Pro Se,* who moves this court to reconsider its order entered on November 8, 1983 on the motion under 28 U.S.C. Section 2255 to vacate, set aside, or correct sentence by a person in federal custody, and in support thereof says as follows:

1. That on September 29, 1983 FRANCIS P. TRACEY filed a *pro se* Motion under 28 U.S.C. Section 2255 to vacate, set aside, or correct sentence by a person in federal custody with the United States District Court for the District of Massachusetts. That said Motion was docketed No. 83-2930 by the Clerk of the Court.

2. That at the time of filing said Motion, Francis P. Tracey was in federal custody for purposes of filing said Motion and that this Motion is properly before the Court. (*Robson* v. *United States,* 526 F.2d 1145 (1st Cir. 1975); *Carafas* v. *La Vallee,* 391 U.S. 234 (1968).)

3. That under the Provisions of Rule 10 of the Section 2255 Rules and of 28 U.S.C. Section 636(b), many of the powers and duties of a district judge in a Section 2255 proceeding can be delegated to a United States Magistrate. In the instant matter the original trial judge has elected to deal directly with this Section 2255 Motion (Hon. Judge D. J. MAZZONE).

4. That Section 2255 Rules further state that once the Motion has been presented to the judge, the provisions of Rule 4(b) of the Section 2255 Rules govern:

> "The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court to take such other action as the judge deems appropriate."
>
> (Rule 4(b), *Rules Governing Section 2255; Proceedings for the United States District Courts.)*

5. That in the instant case the court determined Movant's Motion had merit and ordered the United States to respond to said Motion by October 31, 1983.

6. That the United States Attorney evidently responded to Movant's Motion under 28 U.S.C. Section 2255 on October 31, 1983.

7. That your Movant did not receive a copy of the United States Attorney's response to Movant's Motion under 28 U.S.C. Section 2255, contra to Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure. Under Rule 12 of the Section 2255 Rules, the court "may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules."

> (See, *United States* v. *Goodman*, 590 F.2d 705 (8th. Cir. 1979);
>
> Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227 (1978);

Rule 12, *Rules Governing Section 2255 Proceedings for the United States Courts.*)

8. That your Movant received a copy of the "Order of Dismissal of Judge D. J. MAZZONE" from the Clerk of the Court dated November 8, 1983.

9. That your Movant was not allowed an opportunity to respond to the Government's motion in opposition.

10. That in the Memorandum in support of the court's order of dismissal, there is no mention of the underlying theme of Movant's entire Section 2255 Motion, which is, Movant's allegation that the former United States Attorney, Edward Harrington, was a personal friend of Francis X. Green, the Government's *Key Witness*, and that the former United States Attorney Edward Harrington with full knowledge, induced Mr. Francis X. Green to give false testimony at Movant's trial, so as to provide a plausible source for the alleged increase in Movant's wealth during the period in question. Further, by the former United States Attorney Edward Harrington's own series of Affidavits submitted in these proceedings, he denied knowing Mr. Francis X. Green at one point, and then at a later date had a sudden recall of memory that he did know and did meet Mr. Francis X. Green. Further, it is clear from the documents on file that in the least an evidentiary hearing should be afforded Movant in the instant matter as the only true manner in which Movant can properly prove prosecutorial misconduct in this case. Prosecutorial misconduct so infects the entire trial process that it demands a hearing in fairness and justice. (Justice Holmes)

11. That allegations of prosecutorial misconduct wherein the United States Attorney (former) Edward Harrington had a personal association with one Francis X. Green, who had made statements that he was working undercover for Mr. Harrington at a time when Mr. Harrington executed affidavits that he did not know Mr. Green, are not lightly placed, and should, nay demand and cry out for a full hearing on the merits.

12. That under Section 2255 Rules, a district judge may designate a magistrate to conduct hearings, and to make recommendations for disposition. *This is the usual course of procedure in the majority of the district courts.*

(28 U.S.C. Section 636(b)(1)(B);
Rule 10, *Rules Governing Section 2255 Proceedings for the United States District Courts*)

13. That the court is respectfully asked to reconsider its order of November 8, 1983 dismissing Movant's Section 2255 Motion and in the least, to reassign this matter to a magistrate for a full and impartial consideration, so as to be heard by "one who has not already made up one's (judge's) mind." (Alan Dershowitz, *Best-Defense*, 1982)

14. That the court's citation of *United States* v. *Saade*, 652 F.2d 1126 (1st Cir. 1981), as reason to summarily dismiss Movant's allegation of selective prosecution is not well placed, as *Saade* is a completely different case; as in the instant matter *United States* v. *Steele*, 461 F.2d 1148 (9th. Cir. 1972), wherein the Government failed in its attempts to do so, would be more appropriate.

WHEREFORE, Movant asks that the court reconsider its order of dismissal of November 8, 1983, and afford Movant an evidentiary hearing on Movant's Section 2255 Motion, and afford Movant an opportunity to respond to the Government's opposition, and further supplement Movant's Motion pursuant to Rule 7(b) of the Rules Governing Section 2255 Proceedings for the United States Courts, and grant such other relief that the court deem fit.

Respectfully submitted,

FRANCIS P. TRACEY

Motion for reconsideration is *Denied.*

(s) A. DAVID MAZZONE, USDJ, 12/2/83

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 83-2930-MA

FRANCIS P. TRACEY,
PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT

SPECIAL MOTION

SPECIAL MOTION FOR RECONSIDERATION OF DISMISSAL OF MOTION PURSUANT TO 28 U.S.C. SECTION 2255 TO VACATE, SET ASIDE OR CORRECT SENTENCE

Now comes FRANCIS P. TRACEY, pro se, and moves the court to vacate its order dening movant's motion for reconsideration, and in support files the attached affidavit and memorandum and says as follows:

1. That movant has filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct sentence, which § 2255 motion has been properly placed before this honorable court.

2. That the court, after reviewing movant's § 2255 motion and papers on file with the court, found merit in movant's § 2255 motion and ordered the Government to respond to said motion.

3. That movant's motion asked the court to recuse itself from these proceedings and allow movant's § 2255 motion be assigned to a magistrate of the district court so designated to hear § 2255 motions as determined by the district court or be heard by some other judge as designated by the court, and allow movant's § 2255 be set down for a hearing to fully air movant's allegations of facts, which if these allegations were accepted as true, would require a grant of relief on movant's § 2255 motion. Movant has requested that his motion be heard

by a judge of the district court other than the trial judge in order for movant's motion under § 2255 be heard by a judge "who has not already made up his mind".

4. That the court, without due consideration, upon receipt of the Government's answer, denied movant's motion.

5. That a motion for reconsideration was timely filed with the court and properly placed before this honorable court. It is this motion for reconsideration that is the subject of the instant motion in this matter.

6. That District Judge A. DAVID MAZZONE's order of denial (See Movant's Exhibit "A" attached and made a part hereto) was entered in violation of Rule 12 of the Local Rules of the United States District Court for the District of Massachusetts.

(See *Local Rules of the United States District Court for the District of Massachusetts*, effective January 1, 1980, pages 13, 14.)

(See attached Memorandum in support of the instant motion.)

7. That said order of the court was entered less than 2 days after the date that the Government's opposition to the motion for reconsideration was mailed to the movant.

(See movant's Exhibit "B" attached hereto and made a part thereof.)

8. The movant was denied his right to request oral argument on the motion filed.

WHEREFORE, the movant asks the court to vacate its order entered December 2, 1983 on its own motion, and reconsider its order of dismissal of movant's § 2255 motion and allow oral arguments on the merits of said motion for reconsideration, and oral arguments on the Government's motion in opposition to movant's motion for reconsideration, and afford an evidentiary hearing on his motion, and further allow movant to supplement his motion pursuant to Rule 7(b) of the Rules Governing § 2255 Proceedings for the United States Courts, and grant such other relief that the court deems fit.

Further, that said request should be granted in fairness and justice, as provided by the Federal Rules of Criminal Procedure and the Rules of the United States District Courts.

Respectfully submitted,

FRANCIS P. TRACEY

DATED: December 14, 1983

Motion Denied. Oral argument would not be helpful to a resolution of this matter. Local Rule 12(e).

(s) A. DAVID MAZZONE
USDJ 12/20/83

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 83-2930 MA

FRANCIS P. TRACEY,
PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT

SPECIAL MOTION

SPECIAL MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION REQUESTING ORAL ARGUMENT ON MOTION FOR RECONSIDERATION

Now comes FRANCIS P. TRACEY, *pro se*, and moves the court to vacate its order denying an opportunity for Movant to request oral argument on his motion for reconsideration of dismissal of motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct sentence, and in support thereof files the attached affidavit and memorandum, and says as follows:

1. That Movant has filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct sentence, which § 2255 motion has been properly placed before this honorable court and has been docketed number 83-2930 MA.

2. That the court, after reviewing movant's § 2255 motion and papers on file with the court, found merit in Movant's § 2255 motion and ordered the Government to respond to said motion.

3. That the instant motion is filed in light of recent Federal Court decisions in *The Belt, Inc.* v. *Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99 (Eastern District of Virginia, 1983).

4. That Movant's motion asked the court to recuse itself from these proceedings and allow Movant's § 2255 motion be assigned to a magistrate of the district court so designated to hear § 2255 motions as determined by the District Court or in the alternative be heard by some other District Judge as designated by the Court, and allow Movant's § 2255 be set down for a hearing to fully air Movant's allegations, which allegations if were accepted as true, would require a grant of relief on Movant's § 2255 motion. Movant has requested that his motion be heard by a Judge of the District Court other than the trial Judge in order for Movant's motion under § 2255 be heard by a Judge "who has not already made up his mind."

5. That the instant motion for reconsideration has been timely filed and is properly before this Court.

6. That Movant Tracey reasserts all the points set forth in his original motion for reconsideration placed before this Honorable Court. A copy of said motion is attached and made a part hereof and annexed as Exhibit "A".

7. That the Honorable Court's order denying reconsideration was in violation of Rule 12(c) Subsection (1) of the Local Rules of the United States Court.

(See *Local Rules of the United States District Courts for the District of Massachusetts*, effective January 1, 1980, pages 13, 14.)

8. That this Honorable Court should reconsider its order denying Movant an opportunity to file a request for oral argument on his motion for reconsideration on the motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence, filed with this Honorable Court.

9. That the Court patently misunderstood Movant's motion and in so doing clearly erred in ruling so hastily on Movant's Motion and that fairness and the interests of Justice should prevail.

WHEREFORE, Movant respectfully requests this Honorable Court to grant his motion for reconsideration, or alternatively, to restructure the Court's order to allow Movant an opportunity to request oral argument.

Respectfully submitted,

FRANCIS P. TRACEY, *pro se*

DATED: January 9, 1983.

Motion Denied. Oral argument would not be of assistance to the Court in the disposition of the motion.

(s) A. DAVID MAZZONE
USDJ
January 17, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 83-2930 MA

FRANCIS P. TRACEY,
PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT

AFFIDAVIT

I, FRANCIS P. TRACEY, having been duly sworn and under oath depose and say as follows:

1. That I am the Movant in the above captioned cause.

2. That I intended to request oral argument on my motion for reconsideration to be supported with memorandum of law within 2 days after receipt of the opposition to the motion filed by the Government pursuant to Rule 12(c) subsection (1) of the Local Rules of the United States District Court for the District of Massachusetts.

3. That the court's "quick action" of denying said motion precluded Movant Tracey's opportunity to file said request and denied Movant Tracey due process in violation of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States of America.

FURTHER, Your Affiant sayeth not.

Signed under the pains and penalties of perjury this 9th., day of January, 1984.

FRANCIS P. TRACEY, *pro se*

SUFFOLK, SS January 9, 1984

Then personally appeared the above named FRANCIS P. TRACEY AND ACKNOWLEDGED THE FOREGOING INSTRUMENT TO BE HIS FREE ACT AND DEED, BEFORE ME

Notary Public
My commission expires:

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 84-1100

FRANCIS P. TRACEY,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID A. MAZZONE, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
BOWNES and BREYER, *Circuit Judges*.

Francis P. Tracey, pro se.
Thomas J. Curley, Jr., Assistant U.S. Attorney, and *William F. Weld*, United States Attorney, on brief for appellee.

July 27, 1984

BOWNES, *Circuit Judge*. This is an appeal from the district court's denial. without hearing, of a 28 U.S.C. § 2255 motion.[1]

[1] 28 U.S.C. § 2255 reads:

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the

Petitioner-appellant, Francis P. Tracey, was convicted by a jury on three counts of income tax evasion in violation of 26 U.S.C. § 7201 and three counts of filing false income tax returns in violation of 26 U.S.C. § 7206(1). Petitioner appealed, and the conviction was affirmed. *United States* v. *Tracey*, 675 F.2d 433 (1st Cir. 1982). Tracey was sentenced to eighteen months in federal prison and ordered to pay a total

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United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order on the motion as from the final judgment on application for writ of habeas coupus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

fine of $15,000. The 2255 motion was filed *pro se* on September 29, 1983; Tracey was released from prison the next day, September 30, 1983.[2] We affirm.

The motion was assigned to the same district court judge who presided at petitioner's trial. He ordered the government to file a responsive pleading. The government complied. By memorandum and order of November 7, 1983, the district court dismissed the petition without a hearing. Petitioner then filed a series of motions for reconsideration. He moved for reconsideration of the court's order; the government replied in opposition, and the motion for reconsideration was denied. Petitioner then filed a special motion for reconsideration that was also denied. Finally, another special motion for reconsideration was filed and denied without argument.

On appeal, petitioner asserts six reasons for vacating or setting aside the sentence: (1) the government unconstitutionally denied him exculpatory evidence; (2) he was a victim of selective prosecution; (3) the government deprived him of a fair trial through the United States Attorney's failure to disclose certain information in the post-conviction proceedings; (4) his sixth amendment rights were violated due to the restricted cross-examination of the key government witness, Francis X. Green; (5) his sentence was based on materially false and prejudicial information in his presentence report; (6) his conviction was obtained through Green's perjured testimony.

Before turning to these contentions, we first note that petitioner raises an issue on this appeal that was not part of his original 2255 motion. He argues that the district court judge, Mazzone, J., who tried the case should not have also decided the 2255 motion.

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[2] The government has not suggested that the case is moot. *See United States* v. *Correa-DeJesus*, 708 F.2d 1283 (11th Cir.), *cert. denied*, 104 S. Ct. 530 (1983); *United States* v. *Hay*, 702 F.2d 572, 573 (5th Cir. 1983); *Courtney* v. *United States*, 486 F.2d 1108, 1109 n.1 (9th Cir. 1973); *Reed* v. *United States*, 471 F.2d 721, 722 (5th Cir. 1973); *Marshall* v. *United States*, 465 F.2d 966, 967 (9th Cir. 1972).

Petitioner claims that because the judge was familiar with the case, he had already made up his mind about the outcome of the motion and should have recused himself. In support of this position, he cites to our opinion in *Halliday* v. *United States*, 380 F.2d 270 (1st Cir. 1967), *cert. denied*, 395 U.S. 971 (1969). *Halliday*, however, is inapposite. The question in that case was whether the same district judge who had accepted pleas of guilty without making any inquiry as to the voluntariness of the pleas or the defendant's understanding of the nature of the charges could decide a 2255 motion requesting a change of pleas on the grounds that the judge had violated Federal Rule of Criminal Procedure 11 in failing to make the inquiry. The motion asserted that in pleading guilty the defendant had been confused and did not understand to what he was pleading guilty. We held that it was not proper for the same judge to review the correctness of his own determination. *Id.* at 272. We specifically stated, however: "This interdiction does not mean that the sentencing judge cannot review a § 2255 petition to conclude, if appropriate, that no evidentiary hearing is required." *Id.* at 274.

Petitioner has alleged no facts on which a claim of bias or prejudice by the judge could be based. *See* 28 U.S.C. §§ 144, 455. We must also note that petitioner's claim of judicial bias came after his 2255 motion and subsequent motions for reconsideration were denied. In *Halliday*, the motion for recusal accompanied the filing of the 2255 motion.

Finally, and quite significantly, we point to Rule 4(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts, which the district court judge followed:

> Rule 4. Preliminary Consideration by Judge
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> (a) Reference to judge; dismissal or order to answer. *The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him*, or, if the judge who imposed sentence was not the trial judge, then it shall go

> to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business. [Emphasis added.]

Petitioner's claims of denial of exculpatory evidence, denial of a fair trial, violation of his sixth amendment right to full cross-examination and that his conviction was obtained through perjured testimony are all based on the testimony of the government's chief witness, Francis X. Green, and Green's alleged relationship with the United States Attorney at the time of the trial. Although the nomenclature was different, the subject matter of these claims was considered and rejected by us in the original appeal, *United States* v. *Tracey*, 675 F.2d 433, and we will not reconsider them. Issues disposed of on a prior appeal will not be reviewed again by way of a 2255 motion. *Dirring* v. *United States*, 370 F.2d 862 (1st Cir. 1967). "Absent an intervening change in the applicable law, issues that have been raised and decided on a motion for a new trial cannot be reconsidered in a subsequent collateral attack." *United States* v. *Sanders*, 723 F.2d 34, 36 (8th Cir. 1983). *See also United States* v. *Orejuela*, 639 F.2d 1055, 1057 (3d Cir. 1981); *Chin* v. *United States*, 622 F.2d 1090, 1092 (2d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *United States* v. *Natelli*, 553 F.2d 5, 7 (2d Cir.), *cert. denied*, 434 U.S. 819 (1977); *United States* v. *Romano*, 516 F.2d 768, 771 (2d Cir.), *cert. denied*, 423 U.S. 994 (1975).

Petitioner's claims that his presentence report contained false, erroneous and prejudicial material were also considered and rejected by us in the first appeal. *United States* v. *Tracey*, 675 F.2d at 440-41. There is no need to cover this ground again.

Finally, we turn to the only claim not raised directly or indirectly on the first appeal, selective prosecution. This was

raised for the first time in petitioner's 2255 motion. Under Federal Rule of Criminal Procedure, 12(b)(1), and 12(f),[3] petitioner waived the right to raise the selective prosecution defense when he did not, as the rule mandates, raise it prior to trial.

Moreover, it is clear that there is no substantive basis to this claim. The law on selective prosecution is well settled in this circuit:

> When considering an attack on the Government's exercise of its broad discretion in the decision whether to prosecute a particular case, we presume that that choice has been made in good faith for reasons of sound governmental policy. *See United States* v. *Lichenstein*, 610 F.2d 1272, 1281 & n.4 (5th Cir.), *cert. denied*, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980); *United States* v. *Union Nacional de Trabajadores*, 576 F.2d 388, 395 (1st Cir. 1978). To overcome this presumption, defendants bear a heavy burden. Only if a defendant can establish *prima facie*
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> > (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against

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[3] Federal Rule of Criminal Procedure 12 reads in relevant part:

(b) **Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

. . . .

(f) **Effect of Failure To Raise Defenses or Objections.** Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

> him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights[,]
>
> does the burden shift to the government to demonstrate that the prosecution was not premised on an invidious objective. *United States* v. *Union Nacional de Trabajadores*, 576 F.2d at 395, *quoting United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

United States v. *Saade*, 652 F.2d 1126, 1135 (1st Cir. 1981).

No facts have been alleged by petitioner tending to show that other individuals similarly situated have not been prosecuted because of the same type of conduct. To the contrary, we take judicial notice that since petitioner's trial at least five officials of the City of Boston have pled guilty or have been convicted of various federal offenses in this district.[4] The presumption that the government's decision to prosecute was made in good faith easily withstands the petitioner's challenge.

Because the 2255 motion was, with one meritless exception, merely a rehash of the first appeal, there was no need for a hearing by the district court judge.

Affirmed.

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[4] *United States* v. *Miller*, Crim. No. 83-192-K (D. Mass. filed November 16, 1983). *United States* v. *Rendini*, Crim. No. 83-0081-MA (D. Mass. filed July 1, 1983); *United States* v. *McNeill*, Crim. No. 82-0330-K (D. Mass. filed April 26, 1983), *aff'd* No. 83-1324 (1st Cir. February 13, 1984); *United States* v. *Williams*, Crim. No. 81-393 (D. Mass. filed March 31, 1982); *United States* v. *Collatos*, Crim. No. 81-365 (D. Mass. filed March 19, 1982).

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 84-1100

FRANCIS P. TRACEY,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

BEFORE
CAMPBELL, *Chief Judge*,
BOWNES and BREYER, *Circuit Judges*.

ORDER OF COURT
Entered: September 11, 1984

Upon consideration of appellant's "Petition for Rehearing",

It is ordered that said petition be and the same hereby is denied.

By the Court:

FRANCIS P. SCIGLIANO, Clerk.

[cc: Messrs: Tracey and Curley]

APPENDIX D

Constitutional Provision

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX E

Constitutional Provision

AMENDMENT VI

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX F

Constitutional Provision

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

Constitutional Provision

ARTICLE 1, SECTION 9, ¶ 2

ARTICLE 1, SECTION 9, ¶ 2. The privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public safety may require it.